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BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 231

UNITED STATES OF AMERICA EX REL. HAROLD E. HIRSHBERG, *Petitioner*

v.

CAPTAIN M. J. MALANAPHY, United States Navy, Commanding Officer, United States Naval Receiving Station, Brooklyn, New York

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 200-212) is reported at 73 F. Supp. 990. The opinions in the Court of Appeals (R. 223-227, 254-264) are reported at 168 F. 2d 503.

JURISDICTION

The judgment of the Court of Appeals (R. 228) was entered on April 9, 1948. A petition for rehearing was denied on June 2, 1948 (R. 264). The petition for a writ of certiorari was filed on August 17, 1948. The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code, as amended [now 28 U. S. C. 1254].

QUESTION PRESENTED

Whether a legally constituted general court-martial of the Navy has jurisdiction to try a chief petty officer in the Navy for an offiense committed in a prior enlistment, within the applicable period of limitations, where that enlistment was terminated by an honorable discharge and was followed by a reenlistment on the day after discharge.

STATUTES AND EXECUTIVE REGULATIONS INVOLVED

The statutes and executive regulations involved are set forth in the Appendix, pp. 27-31, *infra*.

STATEMENT

The facts are neither complex nor in dispute. As shown in petitioner's continuous service record (Rel. Ex. 3, R. 117-127), he has been in the United States Navy since March 24, 1936. On that day he enlisted for the period of his minority; his date of birth having been May 18, 1918 (R. 117, 110). On November 8, 1939, being then at Canton, China, on board the U. S. S. *Mindanao*, he extended

his enlistment for two years (R. 121). When the enlistment expired, on November 7, 1941, he was stationed at Cavite, in the Philippine Islands. He was then honorably discharged, and, on the same day, he reenlisted for four years (R. 123, 125). He was regularly promoted during his service, and on February 23, 1942, attained his present rating of Chief Signalman (R. 125). This made him a Chief Petty Officer in the Navy (34 U. S. C. 176, *infra*, p. 27; Bureau of Naval Personnel Manual, p. 82A; Art. D-5102).

When the United States forces on Corregidor surrendered, in May 1942, petitioner became a prisoner of war of the Japanese, and remained such a prisoner for over three years, until he was liberated in September 1945. Thereafter he passed through various naval hospitals, and on March 26, 1946, while on duty with the Permanent Shore Patrol, Third Naval District, Brooklyn, he received an honorable discharge by reason of the termination of his enlistment, effective on midnight of that day. (R. 125, 127.)

This honorable discharge (Resp. Ex. A, R. 145) was issued by the Executive Officer of the Permanent Short Patrol, by direction. Such discharges are not issued by the Bureau of Naval Personnel of the Navy Department, but are issued by the commanding officer of the man concerned, pursuant to Bureau of Naval Personnel Manual, part D, chapter 9 (Rel. Ex. 5, R. 128).

Petitioner reenlisted in the Navy for four years on the afternoon of the next day, March 27, 1946 (R. 51; Rel. Ex. 2, R. 110). This reenlistment did not require reference to the Bureau of Naval Personnel before being effected, and secured to petitioner all the benefits of continuous service in respect of pay and allowances, longevity increases, and time for transfer to the Fleet Reserve and for retirement (Rel. Ex. 5, R. 128, 129).

Thereafter, on February 24, 1947, petitioner was served with charges dated February 12, 1947, directing his trial before a general court-martial convened by the Commandant, Third Naval District (R. 63; Rel. Ex. 7, R. 134-141). Nine specifications were charged, all setting out offenses alleged to have been committed while petitioner was a Japanese prisoner of war, between November 10, 1942, and March 1, 1944. Petitioner was tried by general court-martial between July 21 and August 12, 1947 (R. 100), and on the latter day was acquitted of seven specifications and convicted of two, namely, maltreating a person subject to his orders, to wit, two other naval enlisted men who were Japanese prisoners of war and members of the work section in his charge (R. 100-101, 134-135, 136).

Petitioner was sentenced to 10 months' confinement, to reduction to the grade of apprentice seaman, and to a dishonorable discharge from the Navy (R. 101). The convening authority reviewed

the case, and, relying on Section 334 of *Naval Courts and Boards, 1937*, approved the proceedings, findings, and sentence (Rel. Ex. 1, R. 100-109).

Meanwhile, on August 18, 1947, the present proceeding was initiated by the filing of a petition for a writ of habeas corpus (R. 7-21), which alleged that the court-martial was without jurisdiction, first, because petitioner was a prisoner of war of the Japanese at the time the offenses alleged were committed and thus was not amenable to United States naval jurisdiction; and second, that because the alleged offenses were committed in an enlistment which had been terminated by an honorable discharge, petitioner was thus relieved of all liability for any acts done in that enlistment, and naval jurisdiction was not revived by his reenlistment the day following the honorable discharge.

The writ issued (R. 5); petitioner was produced in court (R. 1, 33); and, after argument, the district court filed an opinion rejecting petitioner's first contention but sustaining his second (R. 200-212). Petitioner was accordingly ordered released (R. 27). Appeal was timely taken (R. 3), and a motion to dismiss the appeal was denied (R. 219-222).

On appeal, the court below reversed, one judge dissenting, holding that petitioner's reenlistment subsequent to the promulgation of Section 334, *Naval Courts and Boards, 1937*, disposed of any jurisdictional objections (R. 223-227). On re-

hearing, the court below adhered to its original views, in an opinion which pointed out that the court-martial had jurisdiction of petitioner's person and of his offense, and that the Navy's view that the honorable discharge was not the equivalent of a pardon was "permissible and preferable" (R. 254-256). The dissenting judge likewise adhered to his conclusions, but in a new opinion (R. 256-264).

ARGUMENT

Petitioner is an individual who has made the naval service his career; who except for an interval of a fraction of a day has been in the Navy for twelve and a half years, since March 1936; who was charged with an offense committed while he was serving in the Navy; who was tried by naval court-martial while he was serving in the Navy; who was not amenable to any civil tribunal for his offenses; and who could not have been tried for those offenses by any federal court or jury. Consequently there is no foundation in fact or in law for his suggestion that the decision below involves "an encroachment on the jurisdicton of civilian courts having all the safeguards of the common law" (Pet. 15). Moreover, petitioner's persistent urging that his case is one of general importance (Pet. 9, 10, 13, 14, 15, 20, 22, 27, 28) is completely undermined by his admission (Pet. 14) that the question now raised "has never been considered by this Court nor, prior to this case, by any Federal court."

A. *No civilian court could have tried petitioner for his offenses, but the naval court-martial had full jurisdiction to do so.*—The offenses of which petitioner was convicted were committed in 1943 in the Commonwealth of the Philippines while he was a member of the United States Navy held as a prisoner of war in the Japanese custody during the Japanese occupation of the Philippine Islands. Under accepted standards of international law, he was not in those circumstances amenable to Philippine jurisdiction either during the war or after the termination of hostilities. *Coleman* v. *Tennessee,* 97 U. S. 509; *Dow* v. *Johnson,* 100 U. S. 158. In any event, trial by a Philippine tribunal would not have carried with it any "right" to trial by jury. *Dorr* v. *United States,* 195 U. S. 138; Bill of Rights, Art. III, Constitution of the Philippines (1935), 30 Phil. Laws 371, 371-373.

Moreover, petitioner could not have been tried by any federal district court under the "first brought" clause of old Sec. 41, Judicial Code (28 U. S. C. [1946 ed.] 102), now 18 U. S. C. 3238, for the reason that the substantive provisions which in 1943 and earlier covered offenses within the exclusive jurisdiction of the United States (Criminal Code, Secs. 272-289; 18 U. S. C. [1946 ed.] 451-468) did not extend to the Philippines. Sec. 1 of the Act of July 1, 1902, c. 1369, 32 Stat. 691, 692; see 25 Op. Att'y Gen. 25; Sec. 5 of the Act of Aug. 29,

1916, c. 416, 39 Stat. 545, 547 (48 U. S. C. [1934 ed.] 1003.)[1] Consequently, offenses committed on land in the Philippine Islands prior to independence were not offenses against the United States. Cf. 28 Op. Att'y Gen. 24 (offense committed on board United States ship in Philippine waters). It follows that the dissenting judge below was wholly in error in supposing that the present case involved "waiver of the right to a jury trial in a criminal suit" (R. 263).

This petitioner was accordingly either subject to trial by naval court-martial, or else not subject to trial at all. The court below held, necessarily we submit, that he was subject to trial by naval court-martial. That follows because all of the jurisdictional prerequisites to the validity of such a trial—a legally constituted court, with jurisidiction over person and offense, and empowered to impose the sentence adjudged—were present here.[2]

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[1] The 1902 Act made inapplicable to the Philippines R. S. 1891, which had made the Constitution and laws of the United States applicable to all the territories; and the 1916 Act provided that subsequently enacted laws of the United States should not apply to the Philippines unless therein specifically so provided.

[2] (a) The general court-martial that tried petitioner was lawfully constituted. It was convened by the Commandant, Third Naval District (R. 137), who, pursuant to AGN 38 (Second), *infra*, p. 29, was empowered to convene such a tribunal.

(b) The general court-martial had jurisdiction of petitioner's person; he had reenlisted in the Navy on March 27, 1946, for a period of four years, at which time he bound him-

There is no contention that any of these jurisdictional requirements were lacking, and under the rule many times laid down by this Court, the jurisdiction of the court-martial which tried petitioner is therefore unassailable. *Carter* v. *Roberts*, 177 U. S. 496, 498; *Carter* v. *McClaughry*, 183 U. S. 365, 380-381, 401; *Mullan* v. *United States*, 212 U. S. 516, 520; *In re Yamashita*, 327 U. S. 1, 8-9.[3] Petitioner's contention therefore comes to this, that the honorable discharge which he received is the equiv-

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self to "be subject to such laws, regulations, and articles for the government of the Navy as are or shall be established by the Congress of the United States or other competent authority" (Rel. Ex. 2, R. 110, 114). He was thus at the time of trial subject to naval jurisdiction. See AGN 8, *infra*, p. 28, under which he was convicted, which extends to "any person in the Navy"; see also, *e. g.*, *Ex parte Milligan*, 4 Wall. 2, 123, 137.

(c) The general court-martial had jurisdiction of petitioner's offense; AGN 8 (Second) expressly provides for punishment of any person in the Navy who "is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders."

(d) The sentence imposed was within the limits permitted by law; AGN 8 authorizes, upon conviction, "such punishment as a court-martial may adjudge."

[3] Petitioner has at no time contended that he was denied any procedural safeguards or deprived of any incident of due process of his trial by court-martial. Consequently the present record does not raise any question whether the now expanded scope of habeas corpus on review of judgments of conviction in civil courts (*Johnson* v. *Zerbst*, 304 U. S. 458; *Waley* v. *Johnston*, 316 U. S. 101; *Van Moltke* v. *Gillies*, 332 U. S. 708; cf. *Sunal* v. *Large*, 332 U. S. 174) may similarly have broadened the reach of habeas corpus on review of judgments of conviction in military courts (cf. *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664, 666 (C. C. A. 3)).

alent of a blanket pardon for any undetected crime theretofore committed in the navy service, depriving the court-martial of power to hear his case—even though by reenlistment he had meanwhile resubjected himself to naval jurisdiction.

B. *A person who continues in or resumes naval status remains subject to naval jurisdiction regardless of changes within his naval status.*—As we have already pointed out, the petitioner in this case is a professional sailor; the Navy is his career; and his case therefore can not pose any question as to where the line between civil and military jurisdiction is to be drawn.

It does not involve trial of civilians or of camp-followers by military tribunals, nor any question as to when an individual ceases to be a civilian through entrance into the service or resumes civilian status by leaving the service, nor the statutory extension of court-martial jurisdiction over civilians who were formerly in the service, in respect of frauds committed against the Government in their military or naval status, by virtue of AGN 14 (Eleventh), *infra*, pp. 28-29, or of AW 94 (10 U. S. C. 1566). Petitioner here was not a civilian; he was in the Navy when the offenses charged against him were committed, and when he was tried; and he does not now question his naval status at either of these periods.[4]

[4] Petitioner has abandoned his contention that, because he was a prisoner of war, he could not be subject to naval jurisdiction for anything done while in that status.

The present case involves, therefore, not a civilian, but an individual who has made the Navy his career, who reenlisted on the day following his discharge, and who received all the benefits of continuous service. The narrow question presented is whether the honorable discharge which he received should be given the threefold effect of (a) a pardon for offenses committed in the earlier enlistment but not known to the naval authorities at the time of discharge, (b) a shorter statute of limitations for offenses not barred by limitations at the time of discharge (see AGN 61, *infra*, p. 30), and (c) an estoppel against the United States, although the discharge was issued at Brooklyn in 1946 and the offenses were committed in the Japanese-occupied Philippines in 1943.

Yet, curiously enough, the earlier administrative Army rulings gave to an honorable discharge precisely that threefold effect, but without reliance on any statutory provision. Dig. Op. JAG (1912), p. 515, pars. VIII, I, 1b and 1c; Dig. Op. JAG (1912-1940), par. 369(4), sub-pars. 1, 3; *Manual for Courts-Martial* (1928), par. 10; I Winthrop, *Military Law & Precedents* (2d ed. 1896) *124. However, under the influence of *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y.), the later Army rulings adopt the view that a change within an individual's military status is immaterial so long as his service is continuous or substantially so. See last sub-par. of par. 10, *Manual for Courts-Martial*.

In the *Joly* case, an officer committed an offense while holding an emergency commission; he was discharged from that commission to accept a Regular commission; there was no interval between his services under the respective commissions; and it was held that court-martial jurisdiction to try him for an offense (under AW 95 (10 U. S. C. 1567), which contains no saving clause) committed prior to the discharge was not terminated by the discharge. Numerous rulings have applied this principle in a variety of instances, and the Army rule now seems to be that while jurisdiction continues where two commissions are separated by an honorable discharge and two enlistments by a discharge for the convenience of the Government, it lapses when an honorable discharge intervenes between two enlistments.[5]

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[5] Thus it has been held that military jurisdiction survives a change from contract surgeon to commissioned officer in the medical corps (Dig. Op. JAG (1912-1940), par. 369 (3), sub-par. 1); from a commission in the U. S. Guards to one in the Infantry (*id.*, sub-par. 3); from an emergency commission to a Regular commission (*id.*, sub-par. 4); from a lower grade to a higher one, *i. e.*, promotion (*id.*, sub-par. 5; 31 Op. Att'y Gen. 419), as well as from a higher to a lower one, *i. e.*, statutory demotion followed by recommissioning (Dig. Op. JAG (1912-1940), par. 369 (3), sub-par. 6); from West Point cadet to commissioned status (id., sub-par. 7); and from enlisted to commissioned status (*id.*, sub-par. 2; 2 Op. JAG (1918), p. 644). Similarly, it has been ruled that where a soldier's first enlistment is terminated by a discharge for the convenience of the government, he may be tried in the subsequent enlistment for offenses committed in the first. 1 Bull. JAG

Through 1929, the Navy Department followed the War Department and held that a reenlistment in the Navy did not render a sailor amenable to trial by court-martial in respect of an offense committed in a previous enlistment which had been terminated by an honorable discharge. CMO (Navy Court-Martial Order) 22 of 1917, pp. 7-8 (*semble; dubitante*); CMO 12 of 1921, p. 11; CMO 1 of 1926, p. 9; CMO 12 of 1929, p. 7. Thereafter, in similar cases, the Navy Department sustained its jurisdiction. Sgt. Jacob G. Keller, USMC, GCM record No. 75740 (1932); Pvt. George C. Smith, USMC, GCM record No. 76425 (1934); Mle Archie L. Hammock, USN, GCM record No. 77457 (1936); CMM Everett W. Wyatt, USN, GCM record No. 78075 (1938).[5] The

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13, par. 369(4); s. e., CM 212084, *Johnson*, 10 B. R. 213 (1939). There is an unpublished opinion to the effect that a soldier discharged in occupied territory to accept civilian employment with the American Military Government remains subject as such civilian to trial by court-martial for offenses committed while a soldier, on the ground that *qua* civilian he is in those circumstances serving with the Army within AW. 2 (d), and so was continuously subject to military law. JAGJ 1947 1146, 24 Feb. 1947. The only conflict in the rulings concerns reserve officers who committed offenses during one tour of active duty, and then were sought to be tried during a succeeding tour of active duty, where there was an intervening period of inactive status. Cf. Supp. I to Dig. Op. JAG (1912-1940), p. 10, par. 359(6), with 5 Bull. JAG 122, par. 452(1).

[5] The dissenting judge is in error in stating (R. 258, n. 7) that these cases did not involve Navy Department approval. We are advised by the Office of the Judge Advocate General,

first two cases were the basis for Changes No. 7 to *Naval Courts and Boards, 1923*, promulgated August 16, 1934 (quoted at Pet. 7-8); the first three cases cited were the basis for so much of Sec. 334 of *Naval Courts and Boards, 1937*, *infra*, pp. 30-31, as states that "the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A. G. N."

And this view was thereafter formally reaffirmed in CMO 7 of 1938, p. 42 (R. 209-210).

The change in the Navy Department views reflected by the later rulings is not retroactive in operation so far as petitioner is concerned. He reenlisted twice, in 1941 and again in 1946, after the new rule was announced to the naval service. Insofar, therefore, as enlistment is to be regarded as contractual (*In re Grimley*, 137 U. S. 147), the contracts which he made in 1941 and again in 1946, to "be subject to such laws, regulations and articles * * * as are or shall be established" (R. 114), contemplated a continued amenability to naval jurisdiction under the later enlistment for offen-

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Navy Department, that all of these cases were in fact reviewed in the Department by the Judge Advocate General for legal features, and by the Commandment, U. S. Marine Corps or the Chief, Bureau of Navigation (as the case might be) for disciplinary features. We are further advised that in the cases of Pvt. Smith (GCM record No. 76425) and of CMM Wyatt (GCM record No. 78075), the Secretary of the Navy personally acted on the records of trial.

ses committed but not discovered during the earlier one. Cf. *Great Northern Ry.* v. *Sunburst Co.*, 287 U. S. 358.

And there is no unfairness in the result. The old rule was artificial and, certainly under modern conditions, unrealistic. In earlier times, when a soldier served a full enlistment in a small company, or a sailor on board a single vessel, an honorable discharge issued by an officer constantly present might well be "a formal final judgment passed by the government upon the entire military record of the soldier" or sailor. *United States* v. *Kelly*, 15 Wall. 34, 36. But nowadays, when a soldier normally passes through half a dozen units before separation, or where a sailor who in all likelihood spent nearly all his entire service at sea is routinely discharged at a receiving station—a shore establishment—these consequences do not, *in fact*, attach to an honorable discharge. It is artificial in the extreme to suggest that the United States is now estopped by an honorable discharge signed by an officer in Brooklyn in 1946 (R. 145) who obviously neither had nor could have had any knowledge of petitioner's activities while in Japanese captivity in the Philippines from 1942 to 1944. The new Navy rule had been published to the service and could easily have been ascertained at the time of petitioner's 1941 and 1946 reenlistments, whereas his acts while he was a prisoner of the Japanese were known only to himself, to his fellow prisoners, and to his captors.

Petitioner's contention boils down to this, that, even when he voluntarily re-subjects himself to the Articles for the Government of the Navy, an honorable discharge operates as a blanket pardon for undetected offenses; the answer of the court below to this was simply (R. 255), "it does not." Petitioner's further contentions are that, while jurisdiction survives a change from sergeant to lieutenant or from petty officer to ensign (see note 5, *supra*, pp. 12-13), it is extinguished when either the sergeant or the chief signalman reenlists in grade; and that, although he receives from the Navy all the benefits of continuous service (Rel. Exh. 5, R. 128, 129), the Navy is entitled only to fragmentary non-continuous jurisdiction over him. Here again the short answer, pithily stated by the court below (R. 256), is that "the Navy has had two interpretations and their later one seems to us permissible and preferable."

C. *The Navy intended to change its rule.*—Petitioner argued below (R. 230-237) and continues to urge here (Pet. 20-21) the view that Sec. 334, *Naval Courts and Boards*, 1937, did not amount to a binding regulation or instruction.

That publication, as the court below pointed out (R. 225-226), was approved by the Secretary of the Navy and by the President. Over their signatures appeared the following direction:

> Naval Courts and Boards, 1937, is issued for the government of all persons attached to

> the naval service. It is hereby required and directed that all officers and other persons belonging to the Navy, so far as the duties of each are concerned, make themselves acquainted with, observe and comply with the provisions contained herein.

Naval Courts and Boards, 1937, is, in consequence, within R. S. 1547 (34 U. S. C. 591), *infra*, p. 27, either as "regulations" or as "instructions"—it makes no difference which—and thus has the force of law.

The change in the Navy's rulings between 1929 and 1938 was evidenced by *Naval Courts and Boards* and by a Court-Martial Order. The former was presidentially approved. And, although Court-Martial Orders in the Navy are not signed by the President, it is provided in Art. 74(4) of the presidentially approved *Navy Regulations*, 1920, that they "shall have full force and effect for the guidance of all persons in the Naval Establishment"; and it is further provided as to such orders, in Sec. 5(e) of the presidentially approved *Naval Courts and Boards, 1937*, that "officers of the Naval service are responsible for the observance of instructions contained therein, just as they are for the observance of other lawful regulations."

The bibliography of *Naval Courts and Boards* is discussed and documented at R. 243-247. Cf. *Ex parte Reed*, 100 U. S. 13, 22; *Denby v. Berry*, 263 U. S. 29, 37-38; CMO 10 of 1927, p. 4, at p. 10.

Consequently, this is a situation where the Secretary of the Navy, with the approval of the President, has said that "the Navy Department has passed cases as legal in which enlisted men have been convicted by court-martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A. G. N." Sec. 334. That statement appears in a publication "issued for the government of all persons attached to the naval service," which requires that "all officers and other persons belonging to the Navy * * * comply with the provisions contained therein." On its face, that means just what it says, viz., that similar cases will be held legal in the future, and it is thereafter, see CMO 7 of 1938, p. 42 (R. 209-210), so interpreted by the Secretary of the Navy, who signs Court-Martial Orders (Art. 74(3)(d), *Navy Regulations*, 1920). In those circumstances it is perfectly clear that a like rule was to be followed until a change was duly promulgated; and, in fact, the convening authority did so follow it in this very case (R. 104-107). There is, therefore, no basis for the view, expressed in the dissent (R. 263) and in the petition (Pet. 20-21), that the intent of Sec. 334 was unclear. As the court below indicated (R. 226), the inclusion of this provision in *Naval Courts and Boards, 1937*, would otherwise be meaningless. It is certainly highly significant that no one in the naval service has, since its promulgation, been in any doubt as to its meaning.

Nor is it material (cf. R. 263; Pet 18-19) that the Army and Navy rules are now different in one narrow situation, or that there may be a policy in favor of uniform Army and Navy rules. If, as petitioner urges (Pet. 19), "The recent merger of the armed forces indicates an intention to treat all the services alike," then the short answer is that that intention has not yet been implemented by legislation. The Navy is still subject to the Articles for the Government of the Navy, enacted in 1862 and only amended piecemeal since then. The Army remains subject to the Articles of War of 1920, just amended, the amendments to be effective February 1, 1949 (Title II of the Selective Service Act of 1948; Public 759, 80th Cong., 2d sess.). The Air Force may be subject to still a third code.[9] The truth of the matter is that both legislation and executive regulations for the Army and the Navy have

[8] Petitioner is, however, in error in stating that *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y.) is in conflict with the Army rule. As the authorities collected above, note 5, pp. 12-13, show, the Army consistently held that many changes in military status do not divest court-martial jurisdiction in respect of offenses committed in the earlier status.

[9] Title II of the Selective Service Act of 1948, approved June 24, 1948, goes into effect February 1, 1949. Public 775, approved June 25, 1948, makes applicable to the Air Force "the Articles of War • • • now in effect." But the amendments were not in effect on June 25, 1948, in consequence of which it may be that, after February 1, 1949, the Army will be under one set of Articles of War and the Air Force under another.

been pretty much compartmentalized since the beginning, and that while the resultant non-uniformity may or may not be a logical spectacle, it is not, as the dissenting judge seemed to think (R. 263), a "strange" one. And certainly it is for Congress and the President rather than the courts to provide whatever uniformity may now seem to be desirable.

D. *The Navy had power to change its rule.*— The Navy rule, set out in Sec. 334, *Naval Courts and Boards, 1937,* and in CMO 7 of 1938, p. 42, was not foreclosed by any governing provision of law.

(i) There is no statute governing the case; the only provision for honorable discharges from the Navy is a broad one, which does not purport to confer particular rights. See R. S. 1426-1427 (34 U. S. C. 192-193) *infra,* p. 27; cf. AW 108 (10 U. S. C. 1580); *Patterson* v. *Lamb,* 329 U. S. 539. And, as indicated above, petitioner reenlisted twice after the new ruling was announced to the service.

(ii) No judicial decision stands in the way. It is true that in *United States* v. *Kelly,* 15 Wall. 34, 36, this Court said that——

> the honorable discharge of the deserter was a formal final judgment passed by the government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a *status* of honor; * * *

But the *Kelly* case not only did not involve court-martial jurisdiction, it concerned a soldier who had deserted, who had then been restored to duty by the commander competent to bring him to trial for desertion, and who had thereafter been honorably discharged. This Court held that, in a suit for bounty money, the United States could not go behind the discharge to show the desertion. But since the circumstances under which Kelly was restored to duty amounted to a condonation of his offense (1 Winthrop, *Military Law & Precedents* (2d ed. 1896) *406; *Manual for Courts-Martial* (1928), par. 69*b*), the same result would have followed if the Government had been permitted to go behind the discharge. Moreover, in *United States* v. *Landers*, 92 U. S. 77, where the desertion occurred after bounty money had accrued, and where the soldier's restoration to duty involved the forfeiture of all pay and allowances due or to become due, he was held not entitled to the bounty, notwithstanding that his restoration to duty was followed by an honorable discharge.[10]

Indeed, so much of *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y.), as involved AW 95, and the intimation in *Hironimus* v. *Durant*, 168 F. 2d 288, 294 (C. C. A. 4), pending on certiorari (No. 119, this

[10] "As for the argument that a discharge is equivalent to an adjudication that he had not committed any offense, the case of *United States* v. *Landers*, 92 U. S. 77, shows that *United States* v. *Kelly*, 15 Wall. 34, did not go so far as that." (R. 227.)

Term) support the Navy's view. The *Durant* case suggests that a non-Regular officer wholly inactive might be recalled for prosecution to maintain the discipline and morale of the service, and the respect in which it should be held. This intimation, not necessary to the decision in the *Durant* case, goes farther than the Navy's rule in this case, for petitioner was not recalled *in invitum*, he reenlisted voluntarily.

(iii) Petitioner's principal argument (Pet. 22-26), and, indeed, the main reliance of the dissenting judge's second opinion (R. 256-264), was that the Navy was bound by its settled administrative construction as to the effect of an honorable discharge.

The infirmity of this contention is that the Navy's earlier rule simply cannot be spelled out of anything in the statute.[11] There is not a single word in the Articles for the Government of the Navy which mentions the rule, or which suggests even by remote inference that those articles are inapplicable to one who is in the naval service at the time of trial and who was in the naval service at the time the offense was committed. As the court below aptly said (R. 255-256), "It is not as if the Navy's interpretation from 1862 to 1932 enacted the statute in that form and its opposite

[11] This differentiates *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, and *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, cited by petitioner (Pet. 23, 25-26).

interpretation from 1932 to 1948 were an invalid attempt to amend it."

Here petitioner was punished for violation of an Act of Congress, viz., AGN 8 (Second). The court-martial which tried him was lawfully constituted, it had jurisdiction of his person and of the offense, and its sentence did not exceed the legal limits. The alleged lack of jurisdiction now contended for is not derived from any statute or judicial decision, but stems from an essentially intramural rule, the invention of Bvt. Maj. Gen. Holt, Judge Advocate General of the Army from 1862 to 1875. See *United States* v. *Kelly*, 15 Wall. 34. It was a self-imposed limitation, couched it is true in jurisdictional terms, but certainly completely dehors the statute. That rule, as we have indicated, is entirely unrealistic today, and we submit that the court below was wholly correct in holding that the Navy was not bound to retain the rule, certainly not after *Ex parte Joly*, 290 Fed. 858 (S. D. N. Y.) had undermined its basis.

We recur to the analogy which the Second Circuit deemed apposite (R. 255): If an American commits an offense in Canada and then returns to the United States, Canada cannot try him while he remains here; Canada must extradite him. So, if a sailor commits an offense while in the Navy and then by discharge becomes a civilan, he cannot be tried by naval court-martial unless his offense falls within AGN 14, in which event he can in

effect be "extradited" back into the Navy. But if the American offender voluntarily returns to Canada, he has resubmitted himself to the jurisdiction of Canada, and he cannot defend on the ground that, between offense and trial, he was in the United States. So here: when appellee reenlisted, he voluntarily resubmitted himself to naval jurisdiction, and the circumstance that for fifteen hours he was a civilian did not deprive the naval court-martial of power to try him for offenses committed in the earlier enlistment.

(iv) Of course, as the court below noted (R. 227), no constitutional question arises. The Fifth Amendment expressly excepts "cases arising in the land or naval forces" from the guarantee of trial by jury, and the present case did so arise, regardless of whether "cases" be held to refer to the offense charged (*In re Bogart*, 2 Sawy. 396, Fed. Case No. 1596 (C. C. D. Cal.)), or to the court-martial proceeding. In either event, petitioner is within the exception. And, as we have several times pointed out, the Navy's new rule was not *ex post facto* as to petitioner.

E. *There is no conflict.*—Petitioner asserts (Pet. 21-22) that the decision below is "inconsistent" with that of the Eighth Circuit in *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876, and (Pet. 26-28) with that of the Ninth Circuit in *Gould* v. *Drainer*, 158 F. 2d 981, affirming *Ex parte Drainer*, 65 F. Supp. 410 (N. D. Cal.)

Actually, however, there is neither inconsistency nor conflict.

In the *Ver Mehren* case, the appellant had been tried by court-martial for draft desertion under the 1917 Act, and his counsel had waived a plea to the jurisdiction of the court-martial. He was convicted, escaped, and, many years later, surrendered himself to the military authorities and sought habeas corpus. The Eighth Circuit held, after reviewing the circumstances of his alleged induction, that he had never been lawfully inducted, that accordingly he was never in the Army, and that in consequence he could not confer jurisdiction on the court-martial by failing to plead to its jurisdiction. Obviously this differs from the present case. Petitioner here consented to the naval jurisdiction, not by reason of anything he did or failed to do before the court-martial—in fact, he did enter a plea to its jurisdiction (R. 102-107)—but because he reenlisted. No such factor was present in the *Ver Mehren* case.

Nor is *Gould* v. *Drainer* any closer to the instant case. Drainer had enlisted in the Marine Corps and deserted; thereafter he fraudulently enlisted in the Navy and was in due course honorably discharged from "the U. S. Naval Service." Subsequently he was apprehended and brought to trial before a naval court-martial for desertion from the Naval Service, viz., from the Marine Corps. On habeas corpus it was held that, since the Marine

Corps is a part of the Navy, the honorable discharge made Drainer a civilian, and that he was in consequence not subject to naval law. Assuming that the *Drainer* case gave the discharge its proper effect, it is clearly not controlling here, for while Drainer had become a civilian, petitioner by reenlisting became a sailor again—and was a sailor when tried, which Drainer was not.

But it is not necessary to labor the view that there is no conflict; petitioner admits there is none. He says (Pet. 14), "The effect of reenlistment on the power of the Navy to punish for offenses committed during a prior enlistment has never been considered by this Court nor, prior to this case, by any Federal court."

CONCLUSION

The question presented is *sui generis* and of first impression, there is no conflict, and the case was correctly decided below. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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SEPTEMBER 1948.

APPENDIX

A. PERTINENT STATUTORY PROVISIONS RELATING TO THE NAVY, U. S. C. Title 34:

§ 176. *Establishment of grades and ratings by Secretary of Navy.*

The Secretary of the Navy is authorized, in his discretion, to establish such grades and ratings as may be necessary for the proper administration of the enlisted personnel of the Navy and Marine Corps. (June 4, 1920, ch. 228, § 7, 41 Stat. 836.)

* * * * * *

§ 192. *Honorable discharges; to whom granted.*

Honorable discharges may be granted to all enlisted persons in the Navy. (R. S. § 1426; June 11, 1896, No. 62, 29 Stat. 476.)

§ 193. *Form of honorable discharge.*

Honorable discharges shall be granted according to a form prescribed by the Secretary of the Navy. (R. S. § 1427.)

* * * * * *

§ 591. *Regulations of Navy; what constitute.*

The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner. (R. S. § 1547.)

B. ARTICLES FOR THE GOVERNMENT OF THE NAVY (R. S. 1624; 34 U. S. C. 1200).

Articles established.

The Navy of the United States shall be governed by the following articles:

* * * * * * *

OFFENSES PUNISHABLE AT DISCRETION OF COURT-MARTIAL.

Article 8. *Persons to whom applicable.*

Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy——

First (Scandalous conduct).

Who is guilty of profane swearing, falsehood, drunkenness, gambling, fraud, theft, or any other scandalous conduct tending to the destruction of good morals.

Second (Cruelty):

Or is guilty of cruelty toward or oppression or maltreatment of, any person subject to his orders.

* * * * * * *

OFFENSES PUNISHABLE BY FINE AND IMPRISONMENT.

Article 14. *Persons to whom applicable.*

Fine and imprisonment, or such other punishment as a court-martial may adjudge, shall be inflicted upon any person in the naval service of the United States——

* * * * * * *

Eleventh (Trial of offender after discharge).

And if any person, being guilty of any of

the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

* * * * * * *

GENERAL COURTS-MARTIAL.

* * * * * * *

Article 38. *Convening authority.*

General courts-martial may be convened:

First. By the President, the Secretary of the Navy, the commander in chief of a fleet, and the commending officer of a naval station or a larger shore activity beyond the continental limits of the United States; and

Second. When empowered by the Secretary of the Navy, by the commanding officer of a division, squadron, flotilla, or other naval force afloat, and by the commandant or commanding officer of any naval district, naval base, or naval station, and by the commandant, commnding officer, or chief of any other force or activity of the Navy or Marine Corps, not attached to a naval district, naval base, or naval station. (As amended by the Act of February 12, 1946, c. 5, 60 Stat. 4.)

* * * * * * *

LIMITATION OF TRIAL AND PUNISHMENT.

Article 61. *Limitation of trials; offenses in general.*

No person shall be tried by court-martial or otherwise punished for any offense, except as provided in article 62, which appears to have been committed more than two years before the issuing of the order for such trial or punishment, unless by reason of having absented himself, or of some other manifest impediment he shall not have been amenable to justice within that period.

Article 62. *Desertion in time of peace.*

No person shall be tried by court-martial or otherwise punished for desertion in time of peace committed more than two years before the issuing of the order for such trial or punishment, unless he shall meanwhile have absented himself from the United States, or by reason of some other manifest impediment shall not have been amenable to justice within that peirod, in which case the time of his absence shall be excluded in computing the period of the limitation: *Provided*, That said limitation shall not begin until the end of the term for which said person was enlisted in the service.

C. NAVAL COURTS AND BOARDS, 1937.

Section 334 provides in pertinent part:

* * * Except for offenses provided for in article 14, A. G. N., a court martial may not

try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service. However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court martial after separation from the service is specifically authorized by statute. Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A. G. N.

U. S. GOVERNMENT PRINTING OFFICE 1948—805321/P.O. 118